STATE OF MICHIGAN
DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES
BUREAU OF HEARINGS

In the matter of	**Docket No. 2001-1582**
XXXXX XXXXX, **Petitioner**	**Agency No. 01-306-BC**
v	**Agency: Office of Financial & Insurance Services**
Blue Cross & Blue Shield of Michigan, **Respondent**	**Case Type: Appeal Subscriber/Provider**
_____/	

Issued and entered
this 20th day of December, 2001
by Robert H. Mourning
Administrative Law Judge

PROPOSAL FOR DECISION

PROCEDURAL HISTORY

This matter is before the Commissioner of Financial and Insurance Services (Commissioner) on the Complaint of XXXXX XXXXX (Petitioner). The Petitioner alleges that Blue Cross and Blue Shield of Michigan (BCBSM or Respondent) failed to comply with the requirements of the Nonprofit Health Care Corporation Reform Act (Act). MCL 550.1101 *et seq;* MSA 24.660(101) *et seq*. The Bureau of Hearings issued a Notice of Hearing on September 7, 2001, scheduling this case for a formal administrative hearing on November 6, 2001, at 9:00 a.m.

On October 9, 2001, the Respondent filed a Motion for Summary Decision with a supporting brief pursuant to 1982 AACS, R 500.2111(c) of the Insurance Bureau Hearing

Procedure Rules. On October 15, 2001, the Petitioner filed a Response to BCBSM's Motion for Summary Decision.

On November 6, 2001, the Administrative Law Judge heard oral argument on the Respondent's Motion for Summary Decision. XXXXX XXXXX appeared as the authorized representative for the Petitioner. Attorney Robert A. Phillips appeared on behalf of BCBSM.

ISSUES AND APPLICABLE LAW

Section 402(1)(d) and (f) of the Act provides that:

> (1) A health care corporation shall not do any of the following:
>
> * * *
>
> (d) Refuse to pay claims without conducting a reasonable investigation based upon the available information.
>
> * * *
>
> (f) Fail to attempt in good faith to make a prompt, fair, and equitable settlement of a claim for which liability has become reasonably clear.
>
> * * *

Section 403(l) of the Act provides that:

> A health care corporation, on a timely basis, shall pay to a member or a participating provider benefits as are entitled and provided under the applicable certificate. When not paid on a timely basis, benefits payable to a member shall bear simple interest from a date 60 days after a satisfactory claim form was received by the health care corporation, at a rate of 12% interest per annum. The interest shall be paid in addition to, and at the time of payment of, the claim.

Section 405(5) of the Act provides that:

> If either the health care corporation or the person disagrees with a determination of the commissioner under this section, the commissioner, if requested to do so by either party, shall proceed to hear the matter as a contested case under the administrative procedures act.

BCBSM'S MOTION FOR SUMMARY DECISION

The Respondent moved for a summary decision under Rule 11(c) – there is no genuine issue of any material fact and the moving party is therefore entitled to a decision in that party's favor as a matter of law.

In presenting a motion for summary decision, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. Neubacher v Globe Furniture Rentals, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. The standard for deciding a motion under Rule 11(c) is well established. The court must review all the evidence presented, including any depositions, affidavits, admissions and pleadings, and then ascertain whether there is any dispute as to the material facts. Omega Construction Company, Inc v Altman, 147 Mich App 649, 652; 382 NW2d 839 (1985).

The Petitioner filed a complaint with the Office of Financial and Insurance Services (OFIS) claiming that BCBSM violated Section 402 and 403 of the Act when it denied payment for the prescription drug Procarin provided to the Petitioner's wife, XXXXX XXXXX. The Petitioner and his wife are covered under the Respondent's Preferred Rx Program

Certificate (Certificate). The Certificate lists what is and what is not covered under the terms of the contract.

The Petitioner's wife has suffered from multiple sclerosis (MS) for a number of years. XXXXXs' treating physician prescribed Procarin in the form of a histamine patch to treat her condition.

The Respondent argues that a prerequisite for any drug to be covered under the Certificate is that the FDA has approved the drug to treat a particular condition. Section 6: "Prescription Drugs Not Covered" reads in relevant part:

> We will not pay for the following:
>
> Any drug or device prescribed for "indications" (uses) other than those specifically approved by the Federal Food and Drug Administration (FDA).

There is no dispute that Procarin is not FDA approved for the treatment of MS.

The Petitioner opposes the Respondent's motion and filed voluminous documents in support of his position. The Petitioner's position is that his wife has experienced positive results using Procarin, which is a prescription drug legally prescribed by her physician. He argues that the fact that Procarin has not been approved by the FDA for the treatment of MS does not mean BCBSM can deny coverage for the medication. He believes that it is a medically recognized treatment for his wife's condition and BCBSM is required to provide reimbursement. Further, the Petitioner argues that Procarin is a covered drug under Section 2 of the Certificate, "Covered Drug" on page 5. Although Procarin is not FDA

approved for MS, the active ingredients in Procarin are a histamine base and caffeine base, both of which are FDA approved for human use for several decades.

Assuming that caffeine and histamine are covered drugs under Section 2 of the Certificate, BCBSM is well within the language of the Certificate under Section 6 when it refuses to pay for Procarin when it is prescribed for MS. Procarin is not FDA approved for the treatment of MS, and it is not a covered benefit under the terms of the Certificate. Therefore, the Respondent's Motion for Summary Decision is granted as a matter of law.

PROPOSED DECISION

The Administrative Law Judge recommends that the Commissioner issue a Final Decision as follows:

(1) That the Respondent's Motion for a Summary Decision is granted under Rule 11(c).

(2) That BCBSM has not violated Sections 402(1)(d) and(f) and 403(1) of the Act and that the Petitioner's Complaint should be dismissed with prejudice.

(3) That BCBSM's request for an award of costs and attorney fees should be denied since the Respondent has not offered any good and sufficient reason for such an award in this case.

EXCEPTIONS

The parties may file exceptions to this Proposal for Decision within 20 days after the Proposal for Decision is issued and entered. Any such exceptions should be filed with the Department of Consumer and Industry Services, Office of Financial and Insurance Services, 611 West Ottawa Street, 2nd Floor, P.O. Box 30220, Lansing, Michigan, 48909,

_____
Robert H. Mourning
Administrative Law Judge